IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 482 of 2006
with
MISC. CRIMINAL APPLICATION No. 7902 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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THAKARSHI NARANBHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR BS SUPEHIA for Appellant(s) : 1,

MR RC KODEKAR, Additional Public Prosecutor for
Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 21/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K A. PUJ,J.)

1. The applicant-appellant-original accused has filed this appeal through jail challenging the judgment and order dated 22.11.2004 of the learned 5th Fast Track Judge, Gondal, in Sessions Case No.24 of 2001 convicting him under Sections 20(a) and 20(a)(i) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentencing him to undergo R.I for 10 years and to pay fine of Rs.1 lakh in default S.I for 1 year.

2. The appeal was admitted by this Court on

20.7.2006. At the time of admission of the appeal, it was noticed that the appellant has not applied for bail and hence an application was filed under Section-389(1) of the Criminal Procedure Code for regular bail. This Court has issued rule on this application on 21.8.2006.

3. At the time of hearing of the bail application Mr.B.S.Supehia, learned advocate appearing for the applicant-appellant has raised very substantive legal issue and hence the Court has thought it just and proper to decide the appeal itself instead of deciding the bail application. Accordingly the appeal is taken up for final hearing.

4. At the out set Mr.Supehia has made it clear that he is not challenging the order of conviction and he would address the Court only on the question of sentence. The charge against the applicant-appellant was that he

had cultivated/planted cannabis plants on the terrace of his house for which information was received by the complainant Mr.M.B.Rana, Police Sub Inspector, Jamkandorna Police Station, Rajkot (Rural) on 19.11.2000 and raid was carried out on the same day. After investigation charge-sheet was filed on 17.2.2001 in the Sessions Court, Gondal and it was registered as Special NDPS Case No.24 of 2001. The charge was read over and explained to the accused as he has not pleaded guilty to the charge. The accused was put to trial and tried by the learned 5th Fast Track Judge, Gondal in Session Case No.24 of 2001. To prove the culpability of the accused the prosecution has examined as many as 13 witnesses, details of which are given in para-3 of the impugned judgment and order. The prosecution has also produced as many as 36 documents and relied upon the contents of the same, details of which are enumerated in para-4 of the impugned judgment

and order.

5. After recording of the evidence of the prosecution witnesses was over, the learned 5th Fast Track Judge, Gondal explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section-313 of the Code. In his further statement, the accused has denied the case of the prosecution by reiterating that he has been falsely implicated.

6. On appreciation, evaluation, analysis and close scrutiny of the evidence adduced by the prosecution, the learned 5th Fast Track Judge, Gondal has held that the accused is guilty of committing an offence under Sections-20(a) and 20(a)(i) of the Act and he was convicted of the said offence.

7. Learned Judge thereafter heard the

accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, accused was sentenced to suffer R.I of 10 years and fine of Rs.1 lac and in default thereof, S.I. Of 1 year for offence punishable under Section-20(a) read with Section-20(a)(i) of the Act.

8. Being aggrieved by the said judgment and order, the accused has filed the aforesaid appeal through jail.

9. Since Mr.Supehia, has not challenged the conviction it is not necessary for this Court to re-appreciate the evidence. As far as imposition of sentence is concerned, Mr.Supehia has submitted that the offence is committed on 19.11.2000 and the appellant-accused is in the custody from that date. The appellant accused is convicted on 22.11.2004. When the offence was committed the old Act

was in force. The Act was amended with effect from 2.10.2001. Under the old Act the cultivation of cannabis plant was prohibited under Section-8(b) and punishment for cultivating cannabis plant was imposable under Section-20(a)(i) for a term which may extend to five years and to pay fine which may extend to fifty thousand rupees. Under the amended Act, which has come into force with effect from 2.10.2001, the cultivation of cannabis plant is punishable under Section-20(a)(i) with imprisonment which may extend to 10 years and shall also be liable to pay fine which may extend to Rs.1 lakh.

10. Mr.Supehia has, however, submitted that Section-41 of the Amended Act, 2001 provides that any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for punishment which is lesser than the punishment for which he is

otherwise liable at the date of the commission of such offence. Thus, on 19.11.2000 when the offence was committed it was punishable with imprisonment for 5 years. The provisions of the amended Act would not be applicable and hence under no circumstance the appellant-accused could have been convicted for any term larger than the term of 5 years. Mr.Supehia has, therefore, submitted that the appellant is in jail since 19.11.2000 and as on today he has already completed 5 years and 10 months. His confinement beyond 5 years would be totally illegal and unjustified and hence the appellant-accused deserves to be released forthwith.

11. Mr.R.C.Kodekar, learned Additional Public Prosecutor, on the other hand submitted that during the course of investigation and trial the Amended Act was very much in force and the date on which the Session Case was

decided by the learned 5th Fast Track Judge, Gondal the Amended Act is in force and hence the punishment of R.I of 10 years is rightly imposed by the learned trial Judge and no interference is called for, especially when the appellant-accused has not pressed his ground challenging the conviction.

12. To appreciate the controversy raised before the Court, it is worthwhile to have a close look at the relevant provisions of the Act. Section-8 prohibits certain operations. Sub Section-(b) of Section-8 says that no person shall cultivate the opium poppy or cannabis plant. Section-20 of the Act imposed punishment for contravention in relation to cannabis plant and cannabis. Section-20(a)(i) prior to its amendment with effect from October, 2001 reads as under :-

"Section-20(a)(i) – Whoever, in contravention of any provision of this Act or any rule or order

made or condition of licence granted thereunder,-

(a) cultivates any cannabis plant; or

(b) .....

shall be punishable.

(i) Where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees.

(ii).....

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

By virtue of the Narcotic Drugs and Psychotropic Substances (Amendment) Act 2001, Section-20(a)(i) is amended and after its amendment, it reads as under:-

"Section-20(a)(i) – Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-

(a) cultivates any cannabis plant; or

(b) .....

shall be punishable.

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may

extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii).....

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

13. Section-41 of the Amendment Act, 2001 deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of this Amendment Act reads as under:-

"Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;

Provided that nothing in this section shall apply to cases pending in appeal."

14. Section-41(1) has come up for consideration before the Hon'ble Supreme Court **in the case of Basheer alias N.P.Basheer vs. State of Kerala, reported in (2004) 3 Supreme Court Cases 609**. It is observed by the Hon'ble Supreme Court that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the 1985 Act as amended by the Act of 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing

structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to

the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

15. From the aforesaid observations made by the Hon'ble Supreme Court, it is clear that the Hon'ble Supreme Court was mainly concerned in that case with rationalisation of the sentence structure. The controversy which arises before this Court in the present appeal was not there before the Hon'ble Supreme Court. However, the observations which have been made to the effect that if the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article

20(1), would certainly help the present appellant and it would be a guiding factor to resolve this controversy. The Court was also mindful of the fact that the amendment in the form of rationalising the sentencing structure is more beneficial to the accused and amount to mollification of the rigour of the law. However, if on the basis of this amendment a person who has committed the offence prior to this amendment, subjecting him conviction and sentence of 5 years and whose offence was investigated and tried after the said amendment shall not be made him liable to the enhanced sentence of 10 years instead of 5 years, as it would certainly hit by rules against post facto legislation contained under Article-20(1) of the Constitution of India.

16. Article-20(1) reads as under :-

"Article-20(1) No person shall be convicted of any offence except for violation of the law in force

at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

17. Prohibitions imposed by Article-20 are directly relevant to the criminal process. Clause (1) is concerned with the substantive law of criminal liability and penalty. Later portion of this article clearly reveals that no person shall be subjected to penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence admittedly committed on 19.11.2000. On that date, old provisions are in force and for commission of such offence, the accused appellant was liable to be sentenced for imprisonment of 5 years and fine of rupees fifty thousand and in default thereof S.I of 6 months. If the amending provisions are

made applicable to the appellant's case in that case the appellant-accused would be liable to be sentenced for R.I of 10 years with fine of Rs.1 lakh and in default thereof S.I of 1 year. This should not be the intention of the legislature and it would hit by the rule against post facto legislation contained in Article-20(1) of the Constitution of India.

18. It is true that the above contention has not been raised before the trial Court and the trial Court had no occasion to deal with the said contention. However, this being a question of law and since no new facts are required to be investigated and there is no dispute about the fact that the offence was committed on 19.11.2000, we are of the view that the sentence of R.I of 10 years with fine of Rs.1 lakh and in default thereof S.I of 1 year is not at all justified. The appellant-accused should have been sentenced

only for R.I of 5 years with fine of rupees fifty thousand and in default thereof S.I of 6 months. Since the appellant-accused has already undergone the sentence of more than 5 years and six months, which is more than the sentence imposable under old provisions even with default of fine i.e 5 years and six months, no further sentence is required to be undergone by the appellant-accused.

19. In the above view of the matter, we partly allow this appeal and for the reasons stated hereinabove, reduce the sentence of 10 years with fine of Rs.1 lakh and in default thereof S.I of 1 year to sentence of R.I 5 years with fine of rupees fifty thousand and in default thereof S.I of 6 months. Since the appellant has undergone this sentence, we direct the jail authority to release the appellant-accused forthwith if his presence is not required in respect of any other case. This appeal is accordingly partly allowed.

20. Since the appeal is disposed of and appellant-accused is ordered to be released forthwith, Misc. Criminal Application No.7902 of 2006 filed by him asking for regular bail, no longer survives and it is accordingly disposed off.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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